Supreme Court, U. S.
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IN THE

Supreme Court of the United States

October Term, 1979

No. 79-1581

COCA-COLA BOTTLING COMPANY
OF ARKANSAS ..... PETITIONER

v.

CHAUFFEURS, TEAMSTERS AND HELPERS
LOCAL UNION NO. 878 ..... RESPONDENTS

Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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IN THE

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October Term, 1979

No. . . . . .

COCA-COLA BOTTLING COMPANY
OF ARKANSAS
OF ARKANSAS . . . . . PETITIONER

v.

CHAUFFEURS, TEAMSTERS AND HELPERS
LOCAL UNION NO. 878 . . . . . RESPONDENTS

Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

Coca-Cola Bottling Company of Arkansas prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit entered in the above case on January 18, 1980, petition for rehearing en banc denied on February 26, 1980.

OPINION BELOW

The judgment and memorandum opinion of the District Court for the Eastern District of Arkansas granting plaintiff's motion for summary judgment and dismissing

defendant's cross-motion for summary judgment is printed in Appendix A hereto and is unreported. The opinion of the Court of Appeals for the Eighth Circuit affirming the judgment of the District Court is printed in Appendix B hereto and is not yet reported in the official reports. The opinion of the Court of Appeals for the Eighth Circuit denying petitioner's request for rehearing en banc is printed in Appendix C hereto and is unreported.

JURISDICTION

The judgment of the Court of Appeals was entered on January 18, 1980, petition for rehearing denied on February 26, 1980. The Court of Appeals stayed its mandate for thirty (30) days on March 14, 1980.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTION PRESENTED

Was the decision and award of the arbitrator holding that the company, under the terms of the collective bargaining agreement, must afford an employee in private employment a due process hearing prior to termination of said employee capricious, arbitrary and without foundation in fact and in law and was it in excess of the authority of the arbitrator?

STATEMENT OF THE CASE

The petitioner is the Coca-Cola Bottling Company of Arkansas, (hereinafter referred to as "Company"). The respondent is the duly certified representative of an appropriate bargaining unit of the petitioner, (hereinafter referred to as "Union"). Ray Lievsay was an employee of the appellant within the appropriate bargaining unit. Ray Lievsay was the grievant in this case, (hereinafter referred to as "Grievant").

The Union and Company had a valid collective bargaining agreement in full force and effect at all times relevant to this case. The collective bargaining agreement contains a grievance and arbitration procedure.

On June 9, 1976, the Company discharged the Grievant for dishonesty. The discharge was pursuant to Article 7 of the Collective Bargaining Agreement. Article 7 reads in part:

> "The employer shall not discharge, suspend or take other disciplinary action with respect to any employee without just cause. In disciplinary matters at least one warning notice of the complaint against the employee shall be given to the employee in writing either by mail or in person and a copy will be sent to the Union; provided, no warning notice need be given to an employee before discharge if the cause of the discharge is dishonesty. . . ."

A grievance was summarily filed and all steps of the grievance procedure were followed by both parties and the

question was timely and properly submitted to the arbitration procedure contained in the collective bargaining agreement.

On March 8, 1977, the arbitrator, after a hearing, issued his decision and award. The arbitrator concluded that "the termination of Lievsay was for just cause — provided due process was followed in handling the discharge." The arbitrator held that the Company had discharged Grievant without due process and required the Company to reinstate the Grievant without back pay.

The Company refused to honor the decision and award of the arbitrator on the good faith belief that the arbitrator's award and decision did not draw its essence from the collective bargaining agreement. More specifically, the Company took the position that the arbitrator had exceeded his contractual authority by reading a due process procedural requirement into the "Discharge and Disciplinary Action" provision of the collective bargaining agreement.

On April 21, 1977, the Union filed suit in the United States District Court, Eastern District of Arkansas, Western Division, under Section 301 of the Labor Management Relations Act, 29 U.S.C. § 185, for the purpose of compelling specific performance to honor the arbitration award.

On March 4, 1977, the Company filed its answer to the complaint of the Union denying the allegations and affirmatively pleading that the arbitrator had exceeded his

authority and that his award and decision did not draw its essence from the contract.

On June 2, 1977, in order to expedite the case as quickly as possible, counsel for the appellee and the appellant agreed to file respective motions for summary judgment and to submit the case to the District Court for decision on the basis of the respective motions and exhibits attached thereto.

On February 2, 1979, the District Court issued its final judgment granting appellee's motion for summary judgment and dismissing appellant's motion for summary judgment.

The District Court upheld the arbitrator's award holding "that the arbitrator's construction of 'just cause' was not an unauthorized modification of the contract but was a legitimate resolution of contractual ambiguity."

On appeal, the Court of Appeals affirmed. The Court held that "just cause may imply procedural as well as substantive requirements" and that "since a just cause term is ambiguous as to its procedural implications, interpretation by an arbitrator is appropriate."

Judge Henley, dissenting, disagreed with the majority's conclusion that the arbitrator was free to imply procedural safeguards to the "just cause" clause of the collective bargaining agreement. In Judge Henley's opinion, the arbitrator was bound by the clear language of the collective bargaining agreement which specifically excluded from the

term "just cause" "any requirement of procedural due process prior to termination for particular types of discharges."

REASONS FOR GRANTING THE WRIT

This Court should grant certiorari to settle the important question of whether an arbitrator may read procedural due process requirements into a collective bargaining agreement that makes no mention of any procedural prerequisites, where the specific language of the agreement sets forth express limitations on the arbitrator's authority to add to the written agreement.

Almost every collective bargaining agreement negotiated between management and labor includes provisions governing the discharge and discipline of employees. A majority of these utilize the specific term "just cause" as the standard for imposing discipline. These written provisions are the basis for the fair and consistent handling of everyday problems in the labor force and are among the most important parts of a collective bargaining agreement. They are essential to the maintenance of a harmonious and productive work force and are customarily the result of firm and careful bargaining between the parties. These provisions are set out in the contract to insure adequate notice of what is required of both the employer and the employee in these matters.

Most collective bargaining agreements contain provisions for arbitration of disputes concerning the

discharge or discipline of employees. The parties are free to assign whatever function they wish to the arbitration procedure, including limitations on the authority of the arbitrator to modify, add to or ignore the express terms of the collective bargaining agreement.

Due to the widespread use of provisions for discharge, discipline and arbitration identical or very similar to those found in the case at bar, the decision of the Court of Appeals upholding the conduct of the arbitrator in this case has a substantial impact on the present rights of a great number of parties currently bound by collective bargaining agreements. The decision lends uncertainty to the meaning and interpretation of language bargained for, agreed upon and set out in contracts governing labor and management relations and threatens the sensitive stability of industrial labor peace.

In the case at bar the arbitrator found that the Grievant was guilty of dishonesty. The arbitrator then found, however, that the Company was required to provide the Grievant with some form of "industrial due process" before discharging the employee which the arbitrator did not define in his opinion.

Article 7 of the collective bargaining agreement entitled "Discharge or Disciplinary Action" states as follows:

> The employer shall not discharge, suspend or take other disciplinary action with respect to any employee without just cause. In disciplinary matters at least one warning notice of the complaint against the employee

shall be given to the employee in writing either by mail or in person and a copy will be sent to the union; PROVIDED, no warning notice need be given to any employee before discharge if the cause of the discharge is dishonesty; physical and/or verbal abuse of a customer; refusal to carry out job assignments; drinking alcoholic beverages or being under their influence while on duty or on employer property; the use of stimulants or narcotics or being under their influence while on duty or on employer property; recklessness resulting in serious accident while on duty or on employer property; the transportation of unauthorized passengers; the carrying of unauthorized firearms; the failure to report an accident to the employer and to the police. The first written warning notice provided herein shall be withdrawn from an employee's file after one year unless during such year the employee shall receive another written warning for the same reason. A pattern of warning notices, related or unrelated, and without limitation in time, shall be just cause for discharge. All warning notices, discharges, suspensions, or other disciplinary action must be by proper written notice to the employee and to the union."

ARTICLE 9, which is entitled "Arbitration Procedure" states:

> "In rendering a decision, the arbitrator shall be governed and limited by the express provisions of this agreement, and the clear intent of the parties as set forth hereinabove. He shall not sit to dispense his own brand of industrial justice and he shall have no power to add to, subtract from, or modify any of the terms and provisions of this agreement and he shall consider and render decisions concerning only such issues as are directly raised by the

> written complaint, which shall not be in any way changed or amended after it is first presented to the employer."

The decision of the Court of Appeals is clearly erroneous for two reasons. First, the language of Article 7 specifically states that no warning notice is required if an employee is discharged for dishonesty. The arbitrator found that the Grievant was discharged for dishonesty. As Circuit Judge Henley states in his dissent:

> "Because the employee in the present case was discharged for dishonesty, the arbitrator was thus compelled by the clear language of the collective bargaining agreement to allow the employer to terminate the employee without notice."

Second, Article 9 specifically declares that the arbitrator is "governed and limited by the express provisions" of the contract and "he shall not sit to dispense his own brand of industrial justice and he shall have no power to add to, subtract from, or modify any of the terms and provisions of the agreement."

The Court of Appeals, in its opinion, determined that the contract is "silent" as to the procedural prerequisites which attach to the discharge under the term "just cause". Obviously, if the contract is silent as to those procedural prerequisites then they are not found in the express language of the contract. If they are not found in the express language of the contract then for the arbitrator to require some form of due process, it would be necessary for him to add it to the express language of the contract or to

dispense his own brand of industrial justice which the contract expressly forbids him from doing.

The judgment below is a serious departure from decisions of the United States Supreme Court concerning the role of an arbitrator and the rights of employers investigating the conduct of their employees on the job.

In *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974), the United States Supreme Court stated:

> "A proper conception of the arbitrator's function is basic. He is not a public tribunal imposed upon the parties by a superior authority which the parties are obligated to accept. He has no general character to administer justice for a community which transcends the parties. He is rather a part of a system of industrial self-government created by and confirmed to the parties. He serves their pleasure only, to administer the rule of law established by their collective bargaining agreement."

Similarly, in *United Steel Workers of America* v. *Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960), the Supreme Court also held:

> "Nevertheless, an arbitrator is confined to interpretation and application of the collective bargaining agreement; he does not sit to dispense his own brand of industrial justice. He may of course look for guidance from many sources, yet his award is legitimate only so long as it draws its essence from the collective bargaining agreement. When the arbitrator's words manifest an infidelity to this obligation, the courts have no choice but to refuse enforcement of the award."

The decision of the Court of Appeals ignores the clear language of *United Steel Workers of America, supra,* by allowing the arbitrator to "dispense his own brand of industrial justice" and apply due process requirements to a clearly worded collective bargaining agreement containing none.

The United States Supreme Court in *NLRB* v. *Weingarten, Inc.*, 420 U.S. 251 (1975), held that where an employee perceives that an investigatory interview may result in discipline, he has the right to require the presence of his union representative under Section 7 of the Labor Management Relations Act.

The Court also stated that the employer has a corresponding right to carry on his interview or investigation without the employee being present. Thus, the employer is given the right to decline to have the employee present in the interview or investigation and thereby avoiding any right of the employee to request that his union representative be present.

The Court in *Weingarten, Inc., supra,* at page 258 and 259 states:

> ". . . the employer is free to carry on his inquiry without interviewing the employee, and thus to leave the employee the choice between having an interview unaccompanied by his representative, or having no interview and foregoing any benefit that might be derived from one."

"As stated in *Mobile Oil (Mobil Oil Corporation v. NLRB*, 482 F.2d 842 (7th Cir. 1973)):

> The employer may, if it wishes, advise the employee that it will not proceed with the interview unless the employee is willing to enter the interview unaccompanied by his representative. . . . The employer would then be free to act on the basis of information obtained from other sources."

These were the corresponding rights of the employer and employee under Section 7 as defined by the United States Supreme Court.

The Court of Appeals, by adding the requirement of a "due process hearing", prior to discipline or discharge, has unilaterally taken away this correlative right of the employer. The Company, in order to meet the standards of "just cause" as now defined by the Court of Appeals, must allow the employee a hearing or interview prior to discipline or discharge contrary to the holding in *Weingarten*.

If the Court of Appeals is correct then virtually every collective bargaining agreement which utilizes the standard language that an employee may be disciplined or discharged for "just cause" and does not expressly state what procedural prerequisites or due process, if any, are required prior to discipline must now be deemed to include some quantum of due process although the precise quantum has been left undefined.

Of course, such due process requirements are "in addition to" and not "in lieu of" the negotiated grievance

procedure which culminates in binding arbitration where witnesses, cross-examination and full remedial power are readily available. In essence, the Court of Appeals now adds, in addition to that negotiated by the parties, a pre-grievance-arbitration procedural step allowing the employee two opportunities for some type of unknown and undefined hearing.

CONCLUSION

For the above stated reasons, this decision will have a substantial impact on management-union relations nationwide and should therefore be reviewed by this Court. It is respectfully submitted that the petition for writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION

CHAUFFEURS, TEAMSTERS AND
HELPERS LOCAL NO. 878. . . . . PLAINTIFF
v. No. LR-C-77-107
COCA COLA BOTTLING COMPANY
OF ARKANSAS . . . . . DEFENDANT

JUDGMENT

Pursuant to the Memorandum and Order entered this date, it is Ordered and Adjudged that judgment in this case for plaintiff be, and it is hereby, entered.

Dated this 2nd day of February, 1979.

Garnett Thomas Eisell
United States District Judge

This document entered on docket sheet in compliance with Rule 53 and/or 79(a) FRCP on 2-5-79 by Sel.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION

CHAUFFEURS, TEAMSTERS AND HELPERS
LOCAL NO. 878
Plaintiff
v. Civil No. LR-C-77-0107
COCA COLA BOTTLING COMPANY
OF ARKANSAS
Defendant

MEMORANDUM AND ORDER

The Plaintiff, Chauffeurs, Teamsters and Helpers Local Union No. 878, (Union) commenced this action under §301 of the Labor Management Relations Act, as amended 29 U.S.C. §185, seeking to require the defendant, Coca-Cola Bottling Company of Arkansas, (Company) to honor the terms of an arbitrator's award rendered pursuant to the collective bargaining agreement between the parties. Both parties have filed motions for Summary Judgment, Fed. Rules Civ. Proc. rule 56, and have agreed that the matter be considered on the basis of the pleadings, exhibits and respective briefs.

The instant controversy stems from the discharge on June 9, 1976, of Ray Lievsay, a Union member employed by the company as a Product Merchandiser. In 1974, Lievsay, who previously had worked for the Company, was employed as a

Merchandiser-Helper and later advanced to Merchandiser. His duties and the events leading to his discharge are set forth in the arbitrator's statement of the case:

> Sales personnel pre-order the load of product the day before the Merchandiser obtains possession of it. The night loading crew load the Merchandisers' trucks in accordance with print-out load sheets. The next morning, the Merchandiser receives a copy of the load sheet from his Supervisor and verifies its accuracy by actual physical count. If he finds a discrepancy between the load sheet and the products on his truck, the Merchandiser reports it to a Clerk-Checker who after making his own count, gives the Merchandiser any product which he is short or, if the Company does not have the product, corrects the discrepancy by giving the Merchandiser proper credit. A Merchandiser should not leave the area until any disagreement as to what is on his truck has been resolved. When the Merchandiser returns from delivering his route, the money and products which he brings back must balance the goods taken out.

Haguewood, who is the official in charge of the operations and activities of the Merchandisers, testified that, about 7:45 A.M. on June 9, 1976, Operations and Production Manager John Bylander informed him that a Merchandiser had broken a case of product in the parking lot prior to leaving that area. It had fallen off his truck. Bylander suspected that the Merchandiser had driven too fast, in a speed-restricted area, with the doors up on the side. He suggested that Haguewood check and see if he could determine how the accident occurred and that he also find out how the broken case had been reported.

In investigating the incident, Haguewood talked with Area Manager Bill Johnson who told him that Lievsay was the Merchandiser involved and that it was a case of Liter Dr. Pepper that had been broken. Johnson, who came up from the ranks and was at one time a Merchandiser, testified that he was standing at the back gate and observed Lievsay sweep up the remains of the case of Liter Dr. Pepper.

Haguewood also talked with Clerk-Checker Jamie Purvis (another bargaining unit employee) who reported that Lievsay had come to him that morning and stated that he was improperly charged with two cases of Liter Sprite and was *short* one case of Ten Ounce Tab, one case of Ten Ounce Fresca and one case of Liter Dr. Pepper. Purvis gave Lievsay credit for the two cases of Liter Sprite, which was a mistaken entry on his load sheet. He told Haguewood that, after checking Lievsay's truck and load sheet and finding that he was short the three other cases, Purvis provided him with one case of Ten Ounce Tab, one of Ten Ounce Fresca and one of Liter Dr. Pepper. Haguewood had Purvis prepare a written statement setting forth these facts . . .

Lievsay's testimony on this point is as follows:

> I told Purvis that I was improperly charged with Liter Sprite, that I was short a case of Tab and one of Fresca and that I had lost a case of Liter Dr. Pepper off my truck and that it was broken. I am sure that he understood what I said. He asked me where it was and I said "right there on the table." He said, "O.K." After the three cases were loaded, I got in my truck and left.

Haguewood went back to his office about 9 A.M.

and reviewed Lievsay's Personnel Record. He found that he had given him two written warnings for failure to carry out job assignments on two successive work days — Friday, April 23, 1976 and Monday, April 26, 1976. One warning ended with the statement, "Failure to carry out a job assignment can result in dismissal" and the other with the statement, "Any further such action on your part will result in dismissal."

. . .

Haguewood had a termination letter written up before talking with Lievsay. He testified that, had Lievsay been able to offer any explanation to convince him that just cause for the discharge did not exist, the letter would not have been given to Lievsay. Lievsay's response to that statement is that he was offered no opportunity to provide an explanation. The Company Brief simply states that the termination letter was presented to "the grievant after he had reported in and turned in all of his cash. Mr. Haguewood testified that this is the Company's normal procedure."

The termination letter reads as follows:

"Dear Mr. Lievsay:

"On this date, prior to leaving the plant for your regular route assignment you were observed sweeping up a case of broken Liter Dr. Pepper. You then proceeded to drive through the loading area where you indicated to the clerk checker that you were charged with two cases of Liter Sprite. You were given credit for these two cases as they were obviously not available. You also indicated that you were "short" one case of 10 oz. Tab, one case of 10 oz. Fresca and one case of Liter Dr. Pepper. These three cases of product were added

to your load. You did not indicate to the clerk checker that you broke the one case of Liter Dr. Pepper.

"By indicating to the clerk checker that you were "short" the one case of Liter Dr. Pepper, when in fact the load was not "short" the one case of Liter Dr. Pepper, we consider this a dishonest action on your part. We are therefore terminating your services effective upon receipt of this letter as provided by Article 7, Section 1 of our contract with Teamsters Local 878."

A grievance filed by Lievsay contesting his termination was processed under the grievance procedure as provided in the collective bargaining agreement and, pursuant thereto, ultimately was submitted to an arbitrator for resolution. The specific issue to be resolved was, "Was the Grievant discharged for just cause?"

The arbitrator's decision was:

". . . that the termination of Lievsay was for just cause *provided* due process was followed in handling the discharge. But the Company's action was marked by a serious defect in that it appears that Management did not give the Grievant adequate opportunity to present his side of the case before discharging him.

* * *

". . ., I conclude that the discharge of Lievsay was not for just cause but that no pay for time lost is appropriate."

It is to be noted that:

"The narrow scope of judicial review of arbitration awards was outlined by the Supreme Court in the Steelworkers triology, *Steelworkers v. American Mfg. Co.*, 363 U.S. 564, *Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, and *Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593. The courts may not review the merits of a grievance or an award. 363 U.S. at 568. An arbitration award will be enforced if 'it draws its essence from the collective bargaining agreement.' 363 U.S. at 597. See also *Campo Machining Co. v. Local Lodge No. 1926, etc.*, 10 Cir. 536 F.2d 330, 332-333. In determining whether an award draws its essence from the Union contract, the courts have applied various tests. An arbitrator's award must be upheld unless it is contrary to the express language of the contract, *Amanda Bent Bolt Co. v. U.A.W.*, 6 Cir., 451 F.2d 1277, 1280; and *Truck Drivers & Helpers Union Local 784 v. Ulry-Talbert Co.*, 8 Cir., 330 F.2d 562, 566, or unless it is 'so unfounded in reason and fact, so unconnected with the wording the purpose of the * * agreement as to "manifest an infidelity to the obligation of the arbitrator." ' *Brotherhood of Railroad Trainmen v. Central of Georgia Railway Co.*, 5 Cir., 415 F.2d 403, 415, cert. denied, 396 U.S. 1008. The award does not draw its essence from the agreement if 'viewed in the light of its language, its context, and any other indicia of the parties' intention,' it is without rational support. *Ludwig Honold Mfg. Co. v. Fletcher,* 3 Cir., 405 F.2d 1123, 1128." *Mistletoe Exp. Serv. v. Motor Expressmen's U.*, 566 F.2d 692 (10 Cir. 1977).

The Eighth Circuit has similarly noted:

"[T]he decision of an arbitrator will not be questioned by the courts as long as the arbitrator has acted within

the scope of his authority as defined in a duly negotiated collective bargaining agreement. *Western Iowa Pork Co. v. Nat'l Brotherhood Packinghouse & Dairy Workers, Local No. 52,* 366 F.2d 275 (8th Cir. 1966). In determining whether an arbitrator has exceeded his authority, the agreement must be broadly construed with all doubts being resolved in favor of the arbitrator's authority. *Bonnot v. Congress of Independent Unions, Local No. 14,* 331 F.2d 355 (8th Cir. 1964). This approach reflects the strong national labor policy favoring arbitration as set forth by the Supreme Court in what has become known as the Steelworkers Trilogy." *Resilient Floor, Etc., v. Welco Mfg. Co., Inc.*, 542 F.2d 1029, 1032 (8th Cir. 1976).

It is not the wisdom of the arbitrator's decision that is in issue here but his authority, as defined in the collective bargaining agreement, to make it. The agreement, as far as pertinent, provided:

"ARTICLE 7 — DISCHARGE OR DISCIPLINARY ACTION

"Section 1 — Cause for Action

"The Employer shall not discharge, suspend or take other disciplinary action with respect to any employee without just cause. In disciplinary matters at least one warning notice of the complaint against the employee shall be given to the employee in writing either by mail or in person and a copy will be sent to the Union; *PROVIDED, no warning notice need be given to an employee before discharge if the cause of the discharge is dishonesty;* physical and/or verbal abuse of a customer; refusal to carry out job assignment;

drinking alcoholic beverages or being under their influence while on duty or on Employer property; the use of stimulants or narcotics or being under their influence while on duty or on Employer property; recklessness resulting in serious accident while on duty or on Employer property; the transportation of unauthorized passengers; the carrying of unauthorized firearms; the failure to report an accident to the Employer and to the police. The first written warning notice provided herein shall be withdrawn from an employee's file after one year unless during such year the employee shall receive another written warning for the same reason. A pattern of warning notices, related or unrelated, and without limitation in time, shall be just cause for discharge. All warning notices, discharges, suspensions, or other disciplinary action must be by proper written notice to the employee and to the Union." (Emphasis added)

"ARTICLE 34 — MANAGEMENT RIGHTS

"The Employer retains and shall continue to exercise any and all rights, authority, powers and privileges which he had prior to the execution of this Agreement except only as such rights, authority, powers and privileges are clearly and expressly relinquished by the specific terms and provisions of this Agreement. Included within such rights, authority, powers and privileges, but without limiting the generality of the foregoing, are the rights to determine the size of the working force and the number of employees required, either temporarily or permanently, in any job classification or department; *the right to reprimand, suspend, discharge or otherwise discipline employees for cause determined to be just by the employer;* . . . (Emphasis added)

"ARTICLE 9 — ARBITRATION PROCEDURE

"It is understood and agreed that a request for arbitration in order to be valid under this Agreement must allege a direct violation of the express purpose of the contractual provision in question, rather than of an indirect or implied purpose, it being the intent of the parties hereto that an arbitration request shall not be valid which challenges the action taken by the Employer in the exercise of its rights set forth in Article 34, except where such challenge is based upon a clear, express limitation thereon.

* * *

"In rendering a decision, the arbitrator shall be governed and limited by the express provisions of this Agreement, and the clear intent of the parties as set forth hereinabove. He shall not sit to dispense his own brand of industrial justice and he shall have no power to add to, subtract from or modify any of the terms and provisions of this Agreement and he shall consider and render decisions concerning only such issues as are directly raised by the written complaint, which shall not be in any way changed or amended after it is first presented to the Employer. The decision of the arbitrator shall be final and binding upon the parties hereto and upon the employee or employees concerned; *PROVIDED, however, that the arbitrator shall make no award outside the scope of his authority outlined herein, or effecting a change, modification or addition to this Agreement, and shall confine himself strictly to the facts submitted in the hearing, the evidence before him, and the express terms and provisions of the contract.*" (Emphasis added)

Defendant contends that the clause stating that "no warning notice need be given to an employee before discharge if the cause of the discharge is dishonesty; etc." is an explicit contractual limitation on the arbitrator's authority to impose any kind of industrial due process "notice and hearing" requirement on the discharge process under this contract. The Court cannot agree that such an explicit contractual limitation appears from the language. The clause is an obvious limitation of the provision stated immediately above it in the contract, that in disciplinary matters at least one warning notice of the complaint against the employee shall be given to the employee in writing either by mail or in person and a copy will be sent to the Union." Such a requirement plainly limits the company's ability to impose disciplinary sanctions against an employee unless a certain minimum cumulative quantum of misconduct has occurred. In contrast, the company may discharge employees for certain specific reasons *without* any cumulative behavior. The lack of a requirement of a warning notice before proceeding in such discharge cases, however, in no way explicitly bears on the procedures to be followed in the resulting discharge process.

It is clear from the contract language that the arbitrator will have to determine some standard by which to measure employer actions against the operative guide of "just causes." The contract language nowhere explicitly covers the question of what requirements may obtain in the *process* of a discharge. In this case, the arbitrator, dispite somewhat inexact language, clearly interpreted the requirement of "just cause" for discharge to include not only the substantive elements of appropriate factual

circumstances but also the procedural requirement of what is commonly referred to as "industrial due process" that the employee be given some minimal, adequate opportunity to present his side of the case before the discharge. The Court recognizes that such a requirement does not have its specific foundation in constitutional law, or in any specific language of the contract, but the Court cannot say that the arbitrator's requirement is unfounded in reason or so unconnected with the wording and purpose of the agreement as to manifest an infidelity to the obligation of the arbitrator. *See Moore's Seafood Products, Inc.*, 50 Lab. Arb. 83 (Daugherty, 1968); *Missouri Research Laboratories*, 55 Lab. Arb. 197 (Bd. of Arb., 1970); *Farmbest, Inc.*, 44 Lab. Arb. 609 (Karlins, 1965). The Court is simply unpersuaded that a true arbitral "modification" of the agreement has occurred in this case, *compare Torrington Co. v. Metal Prods. Workers Local 1645*, 362 F.2d 677 (2d Cir. 1966), *with Holly Sugar Corp. v. Distillery Workers Union*, 412 F.2d 899 (9th Cir. 1969); *United Steelworkers v. Warrior & Gulf Nav. Co.*, 363 U.S. 574, 581-82 (1960), and therefore concludes that the arbitrator was within his authority in rendering this decision, including the remedial provision.

It is therefore Ordered that plaintiff's motion for summary judgment, seeking defendant's compliance with the decision of the arbitrator, be, and it is hereby granted. Defendant's motion for summary judgment, concomitantly, is denied. Judgement will be entered accordingly.

It is further Ordered that each party bear its own costs,

and that no attorney's fees assessment against plaintiff for bad faith conduct is warranted.

Dated this 2nd day of February, 1979.

Garnett Thomas Eisell
United States District Judge

This document entered on docket sheet in compliance with Rule 58 and/or 79(a) FRCP on 2-5-79 by Sel.

APPENDIX B

UNITED STATES COURT OF APPEALS
For the Eighth Circuit

No. 79-1196

Chauffeurs, Teamsters and Helpers
Local Union No. 878,

Appellee,

v.

Coca-Cola Bottling Company,

Appellant.

Appeal from the United States District Court for the Eastern District of Arkansas.

Submitted: October 8, 1979
Filed: January 18, 1980

Before LAY,* Chief Judge, and HEANEY and HENLEY, Circuit Judges.

HEANEY, Circuit Judge.

The sole issue on appeal is whether an arbitrator exceeded his authority in reinstating a discharged employee of the Coca Cola Bottling Company of Arkansas. The discharge was submitted to arbitration pursuant to a collective bargaining agreement between the Chauffeurs, Teamsters and Helpers Local No. 878 and the Company. After arbitration, the Company refused to reinstate the

*Judge Donald P. Lay became Chief Judge on January 1, 1980.

employee. The Union then commenced this action in district court[1] under §301 of the Labor Management Relations Act, 29 U.S.C §185, seeking to compel enforcement. On cross motions for summary judgment pursuant to Rule 56, F.R.Civ. P., the district court found the arbitrator's decision to be within the authority granted to him by the bargaining agreement and ordered compliance. We affirm.

I.

We note initially that judicial review of labor arbitration is limited. This Court recently summarized the nature of that review as follows:

> To effectuate the strong federal policy favoring arbitration as a means of resolving labor disputes, our review of the arbitrator's award is limited. *United Steelwkrs. of Am. v. American Mfg. Co.*, 363 U.S. 564, 80 S.Ct. 1343, 4 L.Ed. 2d 1403 (1960); *United Steelwkrs. of Am. v. Warrior & Gulf N. Co.*, 363 U.S. 574, 80 S.Ct. 1347, 4 L.Ed.2d 1409 (1960); *United Steelwkrs. of Am. v. Enterprise Wheel & Car Corp.*, [363 U.S. 593, 80 S.Ct. 1358, 4 L.Ed.2d 1424 (1960)]. *See also Resilient Floor v. Welco Mfg. Co., Inc.*, 542 F.2d 1029 (8th Cir. 1976); *General Drivers v. Sears, Roebuck & Co.*, 535 F.2d 1072 (8th Cir. 1976). It is not within the scope of our review to pass upon the merits of a grievance. *See General Drivers & H.U., L. 554 v. Young & Hay Transp. Co.*, 522 F.2d 562 (8th Cir. 1975). The grant of power by the agreement must be broadly construed, with any doubt resolved in favor of the arbitrator's authority. *Resilient Floor Etc. v. Welco Mfg. Co. Inc., supra* at 1032; *Western Iowa Pork Co. v. National Bro. Pack. & Dairy Wkrs.*, [366 F.2d 275, 277 (8th Cir. 1966)].

[1]District Court for the Eastern District of Arkansas.

Kewanee Machinery v. Local U. No. 21, Intern. Bro., 593 F.2d 314, 316-317 (8th Cir. 1979).

With this standard in mind, we turn to the facts of the case.

II.

On the afternoon of June 9, 1976, the Company discharged Ray Lievsay, a Union member, from his employment as a merchandiser. The discharge arose out of an incident that occurred that morning as Lievsay was in the process of preparing to embark on his truck route delivering cases of the Company's product. Apparently, Lievsay broke a case of Dr. Pepper and, instead of admitting this to the Company, he represented to the clerk-checker that he had been shorted this case by the packers. After the missing case was added to his load, Lievsay left on his route.

During the day, Lievsay's supervisor, Mr. Haguewood, was informed by another manager that one of the drivers had broken a case of product in the Company's parking lot. Haguewood investigated and learned that the area manager had observed Lievsay sweeping up the remains of a case of Dr. Pepper in the parking lot near the plant's back gate. Haguewood then talked with the clerk-checker who stated that Lievsay had claimed at checkout that he was improperly charged with two cases of Sprite and that he was short a case each of Tab, Fresca and Dr. Pepper. On the

basis of this information and a review of Lievsay's personnel record, which contained two warnings for prior unrelated incidents, Haguewood decided to terminate Lievsay's employment. He prepared a letter to that effect citing only the dishonesty charge.

That afternoon, after Lievsay returned to the Company's plant and turned in his receipts, he was presented with the letter. He was not afforded an opportunity to tell his side of the story prior to termination.

Within a week, Lievsay filed a grievance claiming that he was unjustly terminated and requesting reinstatement and back pay. This grievance was ultimately submitted to arbitration and the arbitrator, construing a contract term permitting disciplinary action for "just cause," ordered reinstatement but without back pay. In so doing, he found as follows:

> The weight of the evidence indicates that Lievsay told [the Company's clerk-checker] that he was short the case of Liter Dr. Pepper instead of telling him that he had broken the case. * * * This leads to the conclusion that the termination of Lievsay was for just cause *provided* due process was followed in handling the discharge. But the Company's action was marked by a serious defect in that it appears that Management did not give the Grievant adequate opportunity to present his side of the case before discharging him.

(Emphasis included.)

Thus, the arbitrator held that a lack of procedural fairness caused Lievsay's dismissal to fall short of the just cause standard.

The district court, in enforcing the arbitrator's award, held that the arbitrator's construction of "just cause" was not an unauthorized modification of the contract but was a legitimate resolution of contractual ambiguity. The court wrote:

> It is clear from the contract language that the arbitrator will have to determine some standard by by which to measure employer actions against the operative guide of "just causes." The contract language nowhere explicitly covers the question of what requirements may obtain in the *process* of a discharge. In this case, the arbitrator, despite somewhat inexact language, clearly interpreted the requirement of "just cause" for discharge to include not only the substantive elements of appropriate factual circumstances but also the procedural requirement of what is commonly referred to as "industrial due process" that the employee be given some minimal, adequate opportunity to present his side of the case before the discharge. The Court recognizes that such a requirement does not have its specific foundation in constitutional law, or in any specific language of the contract, but the Court cannot say that the arbitrator's requirement is unfounded in reason or so unconnected with the wording and purpose of the agreement as to manifest an infidelity to the obligation of the arbitrator.

Chauffeurs, Teamsters and Helpers Local No. 878 v. Coca-Cola Bottling Company of Arkansas, slip op. at 6-7, No. LR-C-77-0107 (E.D. Ark. Feb. 2, 1979).

III.

The Company's primary contention, advanced to both the district court and us, is that the arbitrator's award is unenforceable because it was without foundation in the collective bargaining agreement and was, therefore, in excess of the arbitrator's authority. In particular, it cites to Articles 7, 9 and 34 of its collective bargaining agreement for the proposition that the arbitrator was without authority to find as he did. These agreements, in pertinent part, are set out below:

ARTICLE 7 — DISCHARGE OR DISCIPLINARY ACTION

Section 1 — Cause for Action

The Employer shall not discharge, suspend or take other disciplinary action with respect to any employee without just cause. In disciplinary matters at least one warning notice of the complaint against the employee shall be given to the employee in writing either by mail or in person and a copy will be sent to the Union; *PROVIDED, no warning notice need be given to an employee before discharge if the cause of the discharge is dishonesty;* physical and/or verbal abuse of a customer; refusal to carry out job assignment; drinking alcoholic beverages or being under their influence while on duty or on Employer property; the use of stimulants or narcotics or being under their influence while on duty or on Employer property; recklessness resulting in serious accident while on duty or on Employer property; the transportation of unauthorized passengers; the carrying of unauthorized firearms; the

failure to report an accident to the Employer and to the police. The first written warning notice provided herein shall be withdrawn from an employee's file after one year unless during such year the employee shall receive another written warning for the same reason. A pattern of warning notices, related or unrelated, and without limitation in time, shall be just cause for discharge. All warning notices, discharges, suspensions, or other disciplinary action must be by proper written notice to the employee and to the Union.

* * * *

ARTICLE 9 — ARBITRATION PROCEDURE

* * * *

In rendering a decision, the arbitrator shall be governed and limited by the express provisions of this Agreement, and the clear intent of the parties as set forth hereinabove. *He shall not sit to dispense his own brand of industrial justice and he shall have no power to add to, subtract from, or modify any of the terms and provisions of this Agreement* and he shall consider and render decision concerning only such issues as are directly raised by the written complaint, which shall not be in any way changed or amended after it is first presented to the Employer.

* * * *

ARTICLE 34 — MANAGEMENT RIGHTS

The Employer retains and shall continue to exercise any and all rights, authority, powers and privileges which it had prior to the execution of this Agreement

except only as such rights, authority, powers and privileges are clearly and expressly relinquished by the specific terms and provisions of this Agreement. Included within such rights, authority, powers and privileges, but without limiting the generality of the foregoing, are the rights to determine the size of the working force and the number of employees required, either temporarily or permanently, in any job classification or department; *the right to reprimand, suspend, discharge or otherwise discipline employees for cause determined to be just by the Employer* * * *.

(Emphasis added.)

The Company argues that Article 7, Section 1, completely defines "just cause," leaving no ambiguity unresolved. It contends that the first sentence of that section is refined by the subsequent sentences which describe the parties' agreement concerning progressive discipline. From this, the Company contends it is clear that dishonesty constitutes just cause for dismissal without prior warning *and* without an opportunity for the employee to explain his side of the story.

This argument is buttressed, according to the Company, by the dictate of Article 9 that the arbitration shall be "limited by the express provisions of [the] Agreement." By forbidding an arbitrator to "dispense his own brand of industrial justice" the contract prohibits the use of concepts not set forth expressly or required by contractual ambiguity. Since Article 7, Section 1, fully defines "just cause," the Company characterizes the arbitrator's due process requirements as an unauthorized

attempt to inflict his own brand of industrial justice onto the parties. Finally, the Company argues that, if any ambiguity exists in the "just cause" term as used in Article 7, it is resolved by Article 34 which makes it explicit that just cause is to be determined by the Company.

IV.

Our analysis of the Company's argument must begin with the observation that Article 34 in no way alters the "just cause" term of Article 7. Article 34 reserves to the Company only those rights not "clearly and expressly relinquished by the specific terms" of the contract. Article 7 clearly and expressly limits the Company's right to discipline without just cause. The general provisions of Article 34 cannot, therefore, alter the more restrictive "specific terms" of Article 7. Lievsay's dismissal was governed by Article 7 and the letter of termination so stated. At most, the two provisions raise an ambiguity in the contract that was within the power of the arbitrator to resolve.

Turning then to the Company's argument based on Articles 7 and 9, we note that its underlying fallacy is its failure to recognize that "just cause" may imply procedural as well as substantive requirements. The contract's clear statement that a single act of dishonesty justifies a discharge is mistakenly viewed as a statement that no procedural requirements attach to the *processing* of that discharge. Quite simply, the contract is silent on what procedural prerequisites attach to the requirement that a discharge be for just cause. Since a "just cause" term is ambiguous as to

its procedural implications, interpretation by an arbitrator is appropriate.

The Company indicates surprise at being presented with an arbitrator's award in which "just cause" was interpreted as having a fair hearing dimension. We think that this surprise is unfounded; arbitrators have long been applying notions of "industrial due process" to "just cause" discharge cases. As Professor Summers noted, "[o]n the bare words 'just cause' arbitrators have built a comprehensive and relatively stable body of both substantive and procedural law." Summers, *Individual Protection Against Unjust Dismissal: Time for a Statute,* 62 Va. L. Rev. 481, 500 (1976) (footenote deleted). Professor Summers also commented that the retention of the bare "just cause" language in newly negotiated agreements is an indication of the widespread acceptance of arbitrators' due process interpretations. *Id.* at 505.[2] To a similar effect are the comments of Professor Getman:

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[2]It should be noted that Professor Summers, in outlining some of the general principles of "just cause" due process as developed by arbitrators, stated that "[t]he employee is not entitled to a hearing before discipline is imposed, unless the contract so provides ***." Summers, *Individual Protection Against Unjust Dismissal: Time for a Statute,* 62 Va. L. Rev. 481, 504 (1976). This characterization of the emerging interpretation of just cause differs from that of Professor Getman, quoted in the text above, and Professors Jennings and Wolters. They wrote, "The most commonly cited violation of due process which did occur revolved around the investigation of the incident. More specifically, *the grievant was not permitted to explain his actions prior to the time the decision to discharge him was made,* or key witnesses to the incident in question were not present to give first-hand testimony at the arbitration hearing." Jennings & Wolters, *Discharge Cases Reconsidered,* 31 Arb.J. 164, 178 (1976) (emphasis added).

> To enhance its chances of winning at arbitration, a company needs to establish careful disciplinary procedures consistent with arbitration awards defining the concept of just cause. Arbitrators generally insist on equal punishment for the same offense, and they require that employees be given advance notice of company rules *and a chance to explain their behavior before they are disciplined.*

Getman, *Labor Arbitration and Dispute Resolution,* 88 Yale L. J. 916, 921 (1979) (footnote deleted, emphasis added). *See also Combustion Engineering, Inc.,* 42 Lab. Arb. 806 (1964) (Daugherty, Arb.).

While our interpretation of "just cause" may differ from that of the arbitrator in this case, such disagreement is irrelevant to our review. We are not to review the merits. *Kewanee Machinery v. Local U. No. 21, Intern, Bro., supra* at 317 n.3.

The Company relies heavily on two cases in which Circuit Courts have set aside awards when the arbitrators injected due process considerations into unambiguous grants of disciplinary authority. We find this reliance inappropriate. In the first case, *Mistletoe Exp. Serv. v. Motor Expressmen's U.,* 566 F.2d 692 (10th Cir. 1977), a driver who collected C.O.D. payments on his route was discharged for failing to settle one of these payments with the company within the required twenty-four hours. The contract provided:

> Employees may be discharged for just cause, among which just causes are the following:

* * * *

> (G) Failure to settle bills and funds collected for the company within twenty-four (24) hours.

Id. at 694.

The arbitrator determined that the company had imposed a too severe penalty for the offense. He held that although there was just cause for a suspension, there was no just cause for discharge. The Tenth Circuit, in refusing to enforce the award, stated:

> The contract says that the acts, which the arbitrator found are just cause for discipline, are just cause for discharge. The arbitrator may not rewrite the labor contract.

Id. at 695.

This case in no way involves an arbitrator's interpretation of the procedural requirements of a "just cause" contract clause. It involved solely the substantive aspects of "just cause" — aspects which were explicitly defined in the contract.

In *Local 342, United Automobile, A. & A. I. Wkrs. v. T.R.W., Inc.*, 402 F.2d 727 (6th Cir. 1968), *cert. denied,* 395 U.S. 910 (1969), an arbitrator reinstated seven employees who were selectively discharged after a strike involving over 200 company employees. The arbitrator based reinstatement on his belief that the procedure

surrounding the discharge was "lacking in fundamental fairness." *Id.* at 729. The Sixth Circuit refused enforcement since the contract unambiguously gave the company "the right * * * to take disciplinary action, including discharge, against any employees who participate in a [strike], whether such action is taken against all of the participants or against only selected participants * * *." *Id.* at 728 (emphasis deleted). The contract was devoid of any "just cause" provision and contained no term requiring interpretation by the arbitrator. The case is, therefore, similarly inapposite.

More on point is *Kewanee Machinery v. Local U. No. 21, Intern. Bro., supra.* There, we enforced an arbitrator's award reinstating an employee who was dismissed for absenteeism even though his absences were caused by a bona fide illness. We observed that the arbitrator's award was based on his resolution of an inherent tension between two contractual provisions, one reserving to the company the unrestricted right to discharge employees, the other providing that seniority and employment relations shall be terminated when an employee is discharged for proper cause. That tension, like the procedural ambiguity inherent in the "just cause" clause now before us, required resolution by the arbitrator.

In short, the arbitrator here was required to decide what "just cause" means. His holding that the term has significant procedural implications is not beyond the scope of his authority. His award drew its essence from the contract and cannot be set aside by this Court. *United Steelwkrs. of Am. v. Enterprise Wheel & Car Corp.*, 363

U.S. 593 (1960).

For these reasons, we affirm.

HENLEY, Circuit Judge, dissenting.

I disagree with the majority's conclusion that the arbitrator's interpretation of the term "just cause" draws its essence from the collective bargaining agreement. Although it is arguable that the use of the term "just cause" may in some contexts provide an employee with an opportunity to explain his actions prior to dismissal,[1] the present collective bargaining agreement specifically reads out of the term "just cause" any requirement of procedural due process prior to termination for particular types of discharges.

Article 7, Section 1 of the agreement provides in pertinent part:

> The Employer shall not discharge, suspend or take other disciplinary action with respect to any employee without just cause. In disciplinary matters at least one warning notice of the complaint against the employee shall be given to the employee . . . PROVIDED, no warning notice need to be given to an employee before discharge if the cause of the discharge is dishonesty . . .

Because the employee in the present case was discharged for dishonesty, the arbitrator was thus compelled by the clear language of the collective bargaining

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[1] *See* Getman, Labor Arbitration and Dispute Resolution, 88 Yale L.J. 916, 921 (1979). *But see* Summers, Individual Protection Against Unjust Dismissal: Time for a Statute, 62 Va. L.Rev. 481, 504 (1976).

agreement to allow the employer to terminate the employee without notice.

While some sort of pre-discharge hearing might have been desirable, the arbitrator was not free to dispense his own brand of industrial justice and read into the express language of the collective bargaining agreement something that is not there. In such circumstances, we should vacate the arbitration award. *United Steelworkers of America v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 597 (1960).

A true copy.

Attest:
CLERK, U.S. COURT OF APPEALS,
EIGHTH CIRCUIT

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

79-1196 September Term, 1979

Chauffeurs, Teamsters &
Helpers Local Union #878,
Appellee

vs.

Coca-Cola Bottling Company
of Arkansas,
Appellant.

The Court having considered petition for rehearing en banc filed by counsel for appellant and being fully advised in the premises, it is ordered that the petition for rehearing en banc be, and it is hereby, denied. Judges Ross, Henley and McMillian would grant the petition for rehearing en banc.

Considering the petition for rehearing en banc as a petition for rehearing, it is ordered that the petition for rehearing also be, and it is hereby, denied.

February 26, 1980

Appeal from the United States
District Court for the
Eastern District of Arkansas

Supreme Court, U. S.
FILED
MAY 9, 1980
MICHAEL RODAK, JR., CLERK

No. 79-1581

IN THE

Supreme Court of the United States

COCA-COLA BOTTLING COMPANY OF ARKANSAS
Petitioners,

vs.

CHAUFFEURS, TEAMSTERS AND HELPERS LOCAL UNION NO. 878
Respondents.

BRIEF FOR RESPONDENTS IN OPPOSITION

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79-1581

IN THE

Supreme Court of the United States

COCA-COLA BOTTLING COMPANY OF ARKANSAS
Petitioners,

vs.

CHAUFFEURS, TEAMSTERS AND HELPERS LOCAL UNION NO. 878
Respondents.

BRIEF FOR RESPONDENTS IN OPPOSITION

QUESTIONS PRESENTED

Did the appellate court err when it affirmed the trial court's decision that an arbitrator did not exceed his authority under the terms of a collective bargaining agreement in reinstating a discharged employee because the arbitrator found that Coca-Cola Bottling Company of Arkansas acted without just cause since it failed to give the employee an opportunity to present his side of the case prior to discharge?

STATUTORY PROVISION INVOLVED

29 U.S.C. §185 (a)

> . . . Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this Act, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

ARGUMENT: REASONS FOR DENYING THE WRIT

I. The Appellate Court Has Not Decided an Important Question of Federal Law Which Has Not But Should Be Settled By This Court.

This is an action to enforce an arbitrator's award filed under §301 of the amended National Labor Relations Act, 29 U.S.C. §185. The Company discharged an employee, Ray Lievsay, on the grounds of dishonesty. Lievsay filed a grievance alleging that he had been unjustly discharged. The union submitted the grievance to arbitration pursuant to article seven of the collective bargaining agreement which imposed limitations upon the company's right to discipline employees. Article seven provides in pertinent part:

> The Employer shall not discharge suspend or take other disciplinary action with respect to any employee without just cause. In disciplinary matters at least one warning notice of the complaint against the employee shall be given to the employee in writing either by mail or in person and a copy will be sent to the Union; PROVIDED, no warning need be given to an employee before discharge if the cause of the discharge is dishonesty

Therefore, the issues before the arbitrator were whether the discharge of Lievsay was for just cause and if not, the proper remedy. On March 8, 1977 the arbitrator issued his decision which provided in pertinent part:

> . . . that the termination of Lievsay was for just cause *provided* due process was followed in handling the discharge. But the Company's action was marked by a serious defect in that it appears that Management did not give the grievant adequate opportunity to present his side of the case before discharging him . . . .

> I conclude that the discharge of Lievsay was not for just cause but that no time for pay lost is appropriate.

By implication, the arbitrator concluded that the term just cause created certain procedural standards which must be followed prior to discharge. Specifically, the arbitrator found that the company must give an employee an opportunity to give his account of the matter with which he is charged prior to discharge.

The company contends that it is an impermissible construction of the collective bargaining agreement to read procedural due process requirements into the just cause standard because article seven of the agreement states that no warning notice is required if an employee is discharged for dishonesty. Further, the company contends that the arbitrator exceeded the authority granted him under article nine of the collective bargaining agreement which provides that an arbitrator is governed and limited by the express provisions of the agreement. It is the company's position that if the contract is silent as to any procedural prerequisites, then the arbitrator is impermissibly adding to the terms of the contract and is instead dispensing his own brand of industrial justice. However, both the trial court and the appellate court concluded that no modification of the agreement had occurred, but rather the arbitrator had looked to the industrial common law to interpret the agreement and to resolve a contractual ambiguity since the phrase just cause was not defined in the agreement.

It is respondent's position that the company has erroneously construed the warning notice provisions in article seven of the agreement. Rather than being a definition of just cause, the requirement of written warning notices indicates that the parties have adopted a system of progressive discipline for which an employee may not be discharged for a single act of misconduct unless it is one of the violations specifically enumerated in article seven of the agreement. For these offenses specifically set forth in article seven, a single act of misconduct may justify

suspension or discharge. Therefore, article seven does not define the phrase just cause. This is not at all unusual.

According to Archibald Cox, many provisions of labor agreements such as the principle of just cause must be expressed in general terms since it is impossible to spell out every detail of life in an industrial establishment. Therefore, arbitrators in interpreting labor agreements regularly base awards upon some foundation other than the language of the contract in order to give meaning to general phrases by the development of subordinate rules. The agreement is the ultimate source of rights, but it generally does not provide the actual criteria of decision. Cox, "Reflections Upon Labor Arbitration," 72 HARV. L. REV. 1482, 1491-93 (1959). This Court has also previously approved the practice of arbitrators going outside the collective bargaining agreement to the industrial common law to resolve contractual ambiguities and to give meaning to words and phrases not defined in the agreement. In *United Steelworkers of America* v. *Enterprise Wheel and Car,* 363 U.S. 593, 596 (1960), the Supreme Court discussed the sources of law upon which the arbitrator may draw in reaching a decision:

> The arbitrator's source of law is not confined to the express provisions of the contract, as the industrial common law—the practices of the industry and the shop—is equally a part of the collective bargaining agreement although not expressed in it.

The Supreme Court has also described a collective bargaining agreements as a generalized code to govern a myriad of cases which the draftsmen could not wholly anticipate and which call into being a new common law of a particular industry or of a particular plant. *John Wiley and Sons, Inc.* v. *Livingston,* 376 U.S. 543, 550 (1964). Further, in *NLRB* v. *Weingarten,* 420 U.S. 251, 267 (1975), the Supreme Court appeared to approve the practice of arbitrator's sustaining the employee's right to union representation at investigatory interviews which an

employee reasonably believes might lead to discipline even though such a right was not explicitly provided for in the collective bargaining agreement. In addition, this Court has held that although the collective bargaining agreement did not contain a no strike clause, one would be implied where the agreement made arbitration the exclusive and compulsory means of resolving disputes. *Teamsters, Chauffeurs, Warehousemen and Helpers of America* v. *Lucas Flour Company,* 369 U.S. 95 (1962) and *Gateway Coal Co.* v. *United Mine Workers,* 414 U.S. 368 (1974). By analogy, then it is not improper for an arbitrator to look outside the agreement to develop a standard with which to judge the discharge since the contract is silent as to the definition of just cause. The fact that the contract is silent does not mean that the arbitrator is adding to or violating the express terms of the agreement.

The arbitrator's construction of the phrase "just cause" to include the requirement that the company afford the grievant an opportunity to present his side of the case prior to discharge is not a departure from the definition of the phrase given by numerous other arbitrators. See *Grief Bros. Cooperage Company,* 42 Lab. Arb. 555, 558 (Daugherty, 1964) which defines just cause. *Moore's Seafood Products, Inc.,* 50 Lab. Arb. 83 (Daugherty, 1968), *Farmbest, Inc.,* 44 Lab. Arb. 609 (Karlins, 1965) and *Phelps Dodge Aluminum,* 52 Lab. Arb. 375 (Howlett, 1969). See also Getman, "Labor Arbitration and Dispute Resolution," 88 *Yale L.J.* 916, 921 (1979) and Summers, "Individual Protection Against Dismissal-Time for a Statute," 62 *Va. L. Rev.* 481, 500 (1976).

Since numerous decisions in the *Labor Arbitration Reports* published by the Bureau of National Affairs for over 15 years have held that the phrase just cause does imply procedural requirements, any sophisticated practicioner of labor law would be aware of the interpretation placed upon the phrase by numerous arbitrators. The appellate court's decision therefore would have no widespread effect or cause uncertainity as to the

procedures an employer should follow in disciplining employees. Further, if an employer did not wish to be bound by procedural protections, he could make that an issue for collective bargaining and either define just cause or specifically exclude procedural protections. When parties agree to a collective bargaining agreement containing an arbitration clause they must be deemed to have been conscious of the federal labor policy favoring arbitration as the means of resolving disputes over the meaning and effect of collective bargaining agreements. *Nolde Brothers Inc.* v. *Bakery Workers,* 430 U.S. 243, 254 (1977).

II. The Decision of the Appellate Court Does Not Conflict With Decisions of the United States Supreme Court

Petitioners also contend that the appellate court's decision conflicts with decisions of the United States Supreme Court concerning the role of an arbitrator and the rights of an employer to investigate the conduct of their employees on the job. Specifically, petitioner cites *Alexander* v. *Gardner-Denver Co.,* 415 U.S. 36 (1974), *United Steel Workers of America* v. *Enterprise Wheel and Car Corp.,* 363 U.S. 593 (1960) and *NLRB* v. *Weingarten, Inc.,* 420 U.S. 251 (1975). Nothing in these three decisions however, conflicts with the appellate court's decision now before the Court. The quotations from both *Gardner-Denver* and *Enterprise Wheel and Car* say nothing more than that it is the function of the arbitrator to interpret and apply the collective bargaining agreement. In *Local Union No. 721, United Packinghouse, Food and Allied Workers* v. *Needham Packing Company,* 376 U.S. 247, 252, 84 S. Ct. 773, 776, 11 L. Ed. 2d 680 (1964), this Court stated that the issue of whether an employee was terminated for just cause involved the interpretation or application of the collective bargaining agreement. Further, the Court in *Weingarten, Inc.,* did not have before it the issue of whether an arbitrator had exceeded his authority under a collective bargaining agreement.

The Court was concerned with a statutory right apart from whatever contractual rights an employee might receive through the process of collective bargaining.

In addition, in the *Weingarten* case, the Court is discussing a statutory right of the employee to make a choice of whether he wants to forego participation in an investigatory interview. The case does not, as petitioner contends, give the employer a statutory right not to hold any type of investigatory interview. Only if the employee insists on having a union representative present is the employer free to act on whatever information he had without an employee interview. Union representation was not an issue in the present case since the company merely handed Lievsay a letter of discharge without attempting to get his side of the case.

CONCLUSION

For the reasons stated above, the Court should deny the petition.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I have on this 8th day of May, 1980 served copies of the foregoing Brief for Respondent in Opposition by depositing them postage prepaid in the United States Mail addressed to E. Harley Cox, Jr., Counsel for Petitioner, Coleman, Gantt, Ramsey and Cox, P.O. Box 8509, Pine Bluff, Arkansas 71611.

Melva Harmon Kozinsky